

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

568

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES OF AMERICA

v.

No. 22710

JAMES K. GREEN,

Appellant.

Appeal from a Judgment of the
United States District Court for the District of Columbia

BRIEF FOR APPELLANT

United States Court of Appeals
for the District of Columbia Circuit

FILED JUN 23 1969

Nathan J. Paulson
CLERK

Alan J. Berkeley
1156 Fifteenth St., N.W.
Washington, D.C. 20005

Attorney for Appellant
(Appointed by this Court)

June 23, 1969.

TABLE

Page

STATEMENT OF ISSUES PRESENTED

1

STATEMENT OF THE CASE

2

A. The Government's Case

4

1. The Appellant's Evidence

6

ARGUMENT

10

1. That the post-arrest single viewing procedure was so unduly prejudicial as to taint fatally the conviction and require a new trial

10

2. That the absence of counsel at the post-arrest single viewing of Appellant by complaining witness rendered in-court identification of Appellant by complaining witness inadmissible

16

CONCLUSION

18

CITATIONS

Cases:

Lates v. United States, 405 F.2d 1104
Chapman v. California, 386 U.S. 18, 87 S.Ct. 824
Clerons v. United States, 408 F.2d 1230
Gilbert v. California, 388 U.S. 263, 87 S.Ct. 1957
Russell v. United States, 408 F.2d 1286
Solomon v. United States, 408 F.2d 1300

12

16

13

10

11, 12

12

* Cases chiefly relied upon.

(i)

	<u>Page</u>
Stovall v. Denno, 388 U.S. 293, 87 S.Ct. 1967	10, 13
United States v. Wade, 388 U.S. 210, 87 S.Ct. 1926	10
Wright v. United States, 404 F.2d 1250	12, 14
Young v. United States, 407 F.2d 720	12

Statutes

§11-521, District of Columbia Code	2
28 U.S.C. §1291	2
§22-1801(a), District of Columbia Code	2
§22-2901, District of Columbia Code	2
§22-2801, District of Columbia Code	2
§22-502, District of Columbia Code	2
§22-3204, District of Columbia Code	2
§22-3202, District of Columbia Code	2

* Cases chiefly relied upon.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES OF AMERICA)

v.)

No. 22,710

JAMES H. GELB,)

Appellant)

BRIEF FOR THE APPELLANT

STATEMENT OF ISSUES PRESENTED

The issues presented by the Appellant are as follows:

1. That the post-arrest single viewing procedure was so unduly prejudicial as to taint fatally the conviction and require a new trial.

2. That the absence of counsel at a post-arrest single viewing of Appellant by complaining witness rendered an in-court identification of Appellant by complaining witness inadmissible.

The present case has not previously been before this Court.

Refer to reply - none

STATEMENT OF THE CASE

This is an appeal from a final judgment of conviction entered by the United States District Court for the District of Columbia. This Court has jurisdiction pursuant to 28 U.S.C. Section 1291. The jurisdiction of the District Court was based upon Section 11-521 of the District of Columbia Code (D.C. Code).

On June 5, 1968, Appellant James K. Green was indicted on eight counts charging (1) first degree burglary while armed in violation of Sections 22-1801(a), -3202, D.C. Code; (2) first degree burglary in violation of Section 22-1801(a), D.C. Code; (3) armed robbery in violation of Sections 22-2901, -3202, D.C. Code; (4) robbery in violation of Section 22-2901; (5) rape while armed in violation of Sections 22-2801, -3202, D.C. Code; (6) rape in violation of Section 22-2801, D.C. Code; (7) assault with a dangerous weapon in violation of Section 22-502, D.C. Code; and (8) carrying a dangerous weapon capable of concealment in violation of Section 22-3204, D.C. Code.

Appellant entered a plea of not guilty on June 21, 1968, and came to trial on October 31, 1968 in the United States District Court for the District of Columbia, before Judge June L. Green and a jury.

On November 6, 1968, Appellant was found guilty on Counts 1, 3, 5, 7 and 8, and not guilty on Counts 2, 4 and 6. On January 3, 1969, a judgment was entered sentencing Appellant to imprisonment for a period of ten (10) to thirty (30) years.

On January 9, 1969, Appellant filed notice of appeal in forma pauperis and on January 14, 1969, the District Court, upon finding that 'Defendant is proceeding on appeal without prepayment of costs', referred to this Court the question of appointment of counsel on appeal. On February 5, 1969, this Court appointed the undersigned to represent Appellant on the appeal.

On April 24, 1969, Appellant forwarded to the United States District Court for the District of Columbia a pro se motion for a new trial 'upon the grounds of ineffective assistance of counsel'. Counsel for Appellant has been apprised that this motion was denied by the trial judge shortly thereafter. Counsel for Appellant twice discussed this point in detail with Appellant and reviewed the matter with counsel below. Counsel for Appellant has been unable to develop facts which would lead counsel to raise this issue on appeal.

A. THE GOVERNMENT'S CASE

Summarized briefly, the Government adduced evidence that shortly after one o'clock on the afternoon of March 27, 1968, Mrs. Lilla Marie Pearce was robbed at gunpoint (Tr. 38-39) and forced at gunpoint to enter her apartment (Tr. 40), wherein she was raped at gunpoint (Tr. 45-46). On April 5, 1968, at approximately 5:00 in the afternoon (Tr. 62), while driving with her husband, Mrs. Pearce's attention was drawn to an individual walking in the street whom she believed to be her assailant (Tr. 62, 64; Tr. 130-132). Mrs. Pearce and her husband then located police officers and, after pointing out the suspect to them, Appellant was arrested (Tr. 65, 134-135, 217-220). At the trial Mrs. Pearce identified Appellant as her assailant (Tr. 36).

One Government witness was a police officer who testified that he observed Appellant on two occasions on the morning of March 27, 1968 in the neighborhood of Mrs. Pearce's apartment (Tr. 143, 146). The officer testified that he recalled Appellant's coat (Tr. 144) and he identified Appellant's shoes, although the officer made the observation from the scout car and Appellant was on foot (Tr. 144-145). On cross-examination, the officer admitted that the distance from the scout car to Appellant walking

on the street was approximately thirty yards (Tr. 50) and it is from a viewing at this distance that the officer's description is based.

The Government presented a medical doctor who testified that he treated Mrs. Pearce on the afternoon of March 27, 1968 and that in his opinion there had been forced intercourse (Tr. 118, 123) and further presented an examiner from the serology section of the FBI laboratory who testified that an examination of the clothing and a bedspread taken from Mrs. Pearce on March 27, 1968 revealed, in his opinion, definite seminal stains (Tr. 255) and also that trousers allegedly worn by Appellant on April 5, 1968 and taken from him after his arrest (Tr. 224-225) in his opinion contained a stain which "is probably a seminal stain". (Tr. 255).

Another Government witness, a hair and fiber examiner from the FBI laboratory, testified that fibers similar to those from the clothing allegedly worn by Appellant on April 5, 1968 and taken from him after his arrest (Tr. 224-225) were found on certain articles of clothing and the bedspread taken from Mrs. Pearce after the attack (Tr. 50, Tr. 270-273). On cross-examination, the FBI fiber examiner testified that the type of fibers found were not uncommon (Tr. 276-277), it would be possible to pick up fibers such as those identified in the course of normal activities (Tr.

292) and that as a result of a conversation with a police officer who brought in the samples (Tr. 274-275), the examiner, "was only searching for certain types and colors of fibers" (Tr. 276). Later during the cross-examination, the examiner denied that he was told to look for gold threads (dress color) and red threads (bedspread color) (Tr. 297). Presumably, having found the certain types and colors of fibers, the examiner ended his examination. Further, the examiner testified that:

"I can't say that they [the identified fibers] came from these individual sources with the exclusion of all other similar garments that could have been manufactured the same way and subjected to the same laundry and things of this nature." (Tr. 278).

At the time of his arrest, Appellant was carrying a .38 caliber revolver and 22 rounds of ammunition (Tr. 166); Mrs. Pearce testified that the revolver produced at trial resembled the revolver held by her assailant (Tr. 39), but admitted on cross-examination that she was not positive (Tr. 101-102).

D. D. THE APPELLANT'S EVIDENCE

During the trial, one of the police officers who arrested Appellant testified that after the arrest Mr. and Mrs. Pearce went to the police station and saw Appellant.

Mr. and Mrs. Pearce were in the Captain's office as this gentleman was brought into the precinct and they saw the gentleman again behind glass doors.' (Tr. 220). There is no indication that counsel was present at the time Mrs. Pearce saw Appellant brought into or behind glass doors at the precinct. At the preliminary hearing at which Mrs. Pearce identified Appellant and by which time an attorney had been appointed to represent Appellant, Mrs. Pearce was not asked to pick her assailant out of a group of people, according to Appellant's testimony (Tr. 521). Appellant further testified that he was not at any time placed in a line-up (Tr. 521); one of the arresting officers also testified that he was unaware of any line-up being held in this case (Tr. 227).

Identification or misidentification was a significant part of the defense, inasmuch as there were several discrepancies in height, weight, complexion, and teeth between Mrs. Pearce's original description to the police and Appellant's features (Tr. 71-77, 227-231; see Motion of Defendant's counsel to Court, 303-304); it is also significant that Appellant was wearing clothes quite similar to those worn by Mrs. Pearce's attacker (Tr. 63) on March 27, 1968, although at the Grand Jury hearing Mrs. Pearce had testified that he had a different coat on (Gr. Jur. Tr., 7). Appellant's clothes and particularly the coat of which much was

made at trial, were not taken from him until after his arrest (Tr. 224) and until after Mrs. Pearce saw Appellant brought into and behind glass doors at the precinct.

At the Grand Jury hearing held on May 8, 1968, Mrs. Pearce was apparently unable to say that Appellant was the man who raped her and responded to the question: "Is Mr. Green the man that raped you on March 27th, 1968?" that "I didn't know his last name, but he's the man I saw at the preliminary hearing." (Gr. Jur. Tr. 6).

Mrs. Pearce testified that while driving with her husband on April 5, 1968, she noticed Appellant walking along the street in the same direction as the car was travelling (Tr. 62). When asked if she recalled anything about his attire at that time, Mrs. Pearce replied in part that he had "a jacket which was similar to that [Government Exhibit 7]" (Tr. 63). Mrs. Pearce further stated that "from the back, ... I thought his figure looked familiar and I turned around and looked out the back window and I thought it was he but I wasn't positive ..." (Tr. 64). Mr. and Mrs. Pearce then drove around the block so as to get a face-on view of Appellant; Mrs. Pearce testified " ... at that time I was positive it was the same person" (Tr. 64) (Emphasis added). It was after circling the block that Mr. and Mrs. Pearce located

police officers and the arrest was made. Both Mr. and Mrs. Pearce testified, as did one of the arresting officers, that the Pearce automobile was approximately one-half block away from the place where the arrest actually occurred, that neither Mr. or Mrs. Pearce left their automobile, and that Mrs. Pearce did not confront Appellant at the scene of the arrest. (Tr. 224).

On cross-examination, Mrs. Pearce was asked if it was not the similarity of the coat Appellant was wearing that called Mrs. Pearce's attention to Appellant. Mrs. Pearce responded that "It was his bearing" (Tr. 102) and explained that "It was the shape of his head and the way he carried himself. It was very difficult to define, but that is the first thing that attracted my attention, but I certainly wouldn't have picked him out solely on those grounds" (Tr. 102-103). In further cross-examination, Mrs. Pearce remained staunch that it was Appellant's apparent self-confidence which attracted her attention, together with "the shape of his head and the structure which I say is unusual" (Tr. 103-106). Mrs. Pearce did not admit on cross-examination that it was the similarity of clothing that initially attracted her attention; on direct examination, Mrs. Pearce did testify that she had indeed noticed the attire (Tr. 63).

As noted supra, Appellant's clothes were not taken from him until several hours after the arrest and Mrs. Pearce's viewing of Appellant in the precinct. (Tr. 224). Further, as noted supra, at the Grand Jury hearing Mrs. Pearce did not identify Appellant as her assailant; Mrs. Pearce identified Appellant as the man presented at the preliminary hearing (Gr. Jur. Tr. 6).

ARGUMENT

- A. THAT THE POST-ARREST SINGLE IDENTIFICATION PROCEDURE WAS SO UNLAWFULLY PREJUDICIAL AS TO TAINT FATAALLY THE CONVICTION AND REQUIRE A NEW TRIAL.
-

Since the Wade-Gilbert-Stovall trilogy of cases, U.S. v. Wade, 388 U.S. 218, 87 S. Ct. 1926 (1967); Gilbert v. California, 388 U.S. 263, 87 S. Ct. 1951 (1967); Stovall v. Denno, 388 U.S. 293, 87 S. Ct. 1967 (1967), it has been a generally accepted proposition that a post-arrest single viewing of a suspect may be "so unnecessarily suggestive and conducive to irreparable mistaken identification that he [is] denied due process of law." Stovall v. Denno, 388 U.S. at 302, 87 S. Ct. at 1972. Appellant submits that under the facts of the case, the circumstances of Mrs. Pearce's on-street identification of Appellant were such that the precinct house viewing could only reinforce the questionable on-street identification.

Mrs. Pearce identified the suspect on the street, from a moving automobile, based upon a similarity of "bearing" and attire and did not get a truly close look at Appellant until the viewing at the precinct house. It is to be noted that the coat worn by Appellant at the time of arrest was "similar" to the coat worn by Mrs. Pearce's assailant; Mrs. Pearce states in her testimony that her principal means for identifying the Appellant was his facial structure, i.e., the shape of his head, not a good face-on viewing. The existence of a sufficient number of discrepancies between Mrs. Pearce's description of her assailant shortly after the attack, and Appellant's features further raises questions as to the accuracy of her on-street identification. There is more than a substantial probability that Mrs. Pearce identified a man with similar "bearing" and attire on the street and got her first good look at the Appellant in the uncontrolled viewing at the precinct house.

A single viewing of a suspect by a witness is not per se prohibited; there are inherent risks in such viewings if they are intended to, or in fact do, substitute for a lineup. A balance must be reached between the need for the single viewing and the inherent risks of such a viewing. Russell v. United States, 408 F.2d 1280 (D.C., 1969). The courts have

generally held that where the suspect is presented to the witness in what may be called a 'hot pursuit' situation, the interests of fresh recollection and immediate confirmation of an identification outweigh the inherent risks of such a single viewing. Wright v. United States, 404 F.2d 1256 (1968); Bates v. United States, 405 F.2d 1104 (1968); Fussell v. United States, supra; Solomon v. United States, 406 F.2d 1306 (D.C., 1969); Young v. United States, 407 F.2d 720 (1969). However, as Justice Burger wrote in Bates v. United States, 405 F.2d 1104 (1968):

'Prudent police work would confine these on-the-spot identifications to situations in which possible doubts as to identification need to be resolved promptly; absent such need, the conventional line-up viewing is the appropriate procedure.' At 1106.

The guiding principle is that there may well be a denial of due process of law if there is in fact a "substantial likelihood of irreparable misidentification".

Appellant submits that the post-arrest single viewing in the precinct house was unnecessarily suggestive and conducive to irreparable mistaken identification. That viewing was entirely unnecessary, as there was no need for an immediate identification and there could have been a proper line-up. Mrs. Pearce had already made the identification on the street, the suspect was arrested; the precinct house viewing only reinforced under uncontrolled circumstances the on-street identification.

Not only was Mrs. Pearce's precinct house identification under such circumstances as to suggest that the police agreed with her identification of Appellant as the assailant, but it had the clear effect of offering Mrs. Pearce the opportunity to reinforce her on-street identification. Mrs. Pearce's in-court identification of Appellant rests solely and squarely on that reinforced viewing and is without an independent source. Clerons v. United States, 403 F.2d 1230 (1969). It is to be noted that at the Grand Jury hearing, Mrs. Pearce was unable to say that Appellant was her assailant; she could only respond to the question of whether Mr. Green was her assailant by replying that "he's the man I saw at the preliminary hearing". (Gr. Jur. Tr., p. 6).

In this instance, the post-arrest single viewing of Appellant by Mrs. Pearce substituted for a line-up; the need for a good and objective identification under controlled circumstances was an essential to due process here. None of the factors justifying a single viewing were present. As the Supreme Court observed in Stovall, "[T]he practice of showing suspects singly to persons for the purpose of identification and not as part of a line-up, has been widely condemned." Stovall v. Denno, *supra*, note 10, 388 U.S. at 302, 87 S. Ct. at 1972. In the totality of the circumstances in this case,

the identification was in a confused setting and the viewing was unnecessary and unnecessarily conducive to irreparable mistaken identification.

It is in situations such as this that the need for the fairest identification procedures becomes apparent. When the police unjustifiably fail to hold a line-up in the interest of protecting against misidentification, then due process has been sorely tested. It is in a case such as this that Judge Hazelon's dissenting view in Wright v. United States, 404 F.2d 1256, becomes relevant:

"The clear thrust of Stovall is that, without justifying circumstances, a one-man show-up is too unnecessarily suggestive to satisfy due process. A line-up must be conducted unless it will necessitate a delay which is likely to make identification impossible or less reliable." At 1262.

The totality of the circumstances surrounding the evidence adduced at trial entitles Appellant to a new trial. Appellant submits that all other evidence adduced at trial is merely corroborative. The keystone of the Government's case was Mrs. Pearce's reinforced and questionable identification. Without that identification, the other evidence adduced would not be sufficient to sustain the conviction.

The testimony of the FBI fiber examiner was not conclusive, yet it is the principal evidence which corroborates that the Appellant was the assailant. As noted supra, the FBI special agent was unable to state that the fibers found on Mrs. Pearce's clothing were from Appellant's clothing and, similarly, was unable to state that fibers found on Appellant's clothing were from Mrs. Pearce's clothing. Further, the FBI special agent was also unable to state that Mrs. Pearce could not have picked up such fibers in the course of her normal activities and that Appellant could not have picked up the threads found on his clothing in the course of his normal activities. As further evidence that the totality of the circumstances warrants a new trial, reference is made to the questionable testimony of the police officer who claims to have observed Appellant in the neighborhood earlier that day, supra, to the confusion with respect to Appellant's coat, and the inability to make a positive identification of the coat.

In view of the nature of the corroborative evidence presented at trial, it is even more apparent that it is Mrs. Pearce's identification that is the sole basis for the Government's case. Absent the reinforced and questionable identification of the Appellant by Mrs. Pearce at the precinct house, Mrs. Pearce had no independent source for the identification.

Appellant submits that, on the facts presented, the admission of Mrs. Pearce's identification of Appellant was not "harmless constitutional error" under the test of Chapman v. California, 368 U.S. 18, 87 S. Ct. 824, and amply demonstrates the need for a new trial.

F. THAT THE ABSENCE OF COUNSEL AT THE POST-ARREST SINGLE VIEWING OF APPELLANT BY COMPLAINING WITNESS RENDERED AN IN-COURT IDENTIFICATION OF APPELLANT BY COMPLAINING WITNESS INADMISSIBLE.

The general rule arising under Wade is that the Sixth Amendment to the Constitution is violated when an accused's counsel is not present at a critical stage of the accusatory process. United States v. Wade, supra. Wade contemplates a line-up situation; the underlying rationale of the opinion is that the line-up is a critical stage of the process at which counsel could: (i) prevent misidentifications and (ii) gather necessary material in preparation for trial.

Appellant recognizes that there was no line-up but that the precinct house identification of Appellant by Mrs. Pearce was a critical stage and critical confrontation in the accusatory process. At the time Mrs. Pearce viewed Appellant at the precinct house, Appellant had not yet had counsel appointed and, indeed, had not had the opportunity

to summon his own counsel. In view of the nature of the testimony adduced at trial, Mrs. Pearce's reinforced and questionable identification becomes an even more critical stage of the proceedings and, perhaps, if counsel had been present as contemplated by Wade, the precinct house viewing would have been a fair and proper identification.

Had counsel been present at the precinct house identification, he would no doubt have asked for a line-up and he would have no doubt requested that Appellant remove his coat so that the identification could be made on the basis of Appellant's features. Further, as contemplated by Wade, had counsel been present at the precinct house identification, counsel would no doubt have been well-prepared to attack that viewing on cross-examination at trial.

It is Appellant's contention that a single viewing which permits a prior questionable identification to be reinforced is a critical stage of the accusatory process and one at which the accused should be afforded the assistance of counsel. In the absence of counsel at that viewing, and in view of the lack of any independent source for Mrs. Pearce's in-court identification of Appellant, Appellant submits that Mrs. Pearce's in-court identification should have been barred.

CONCLUSION

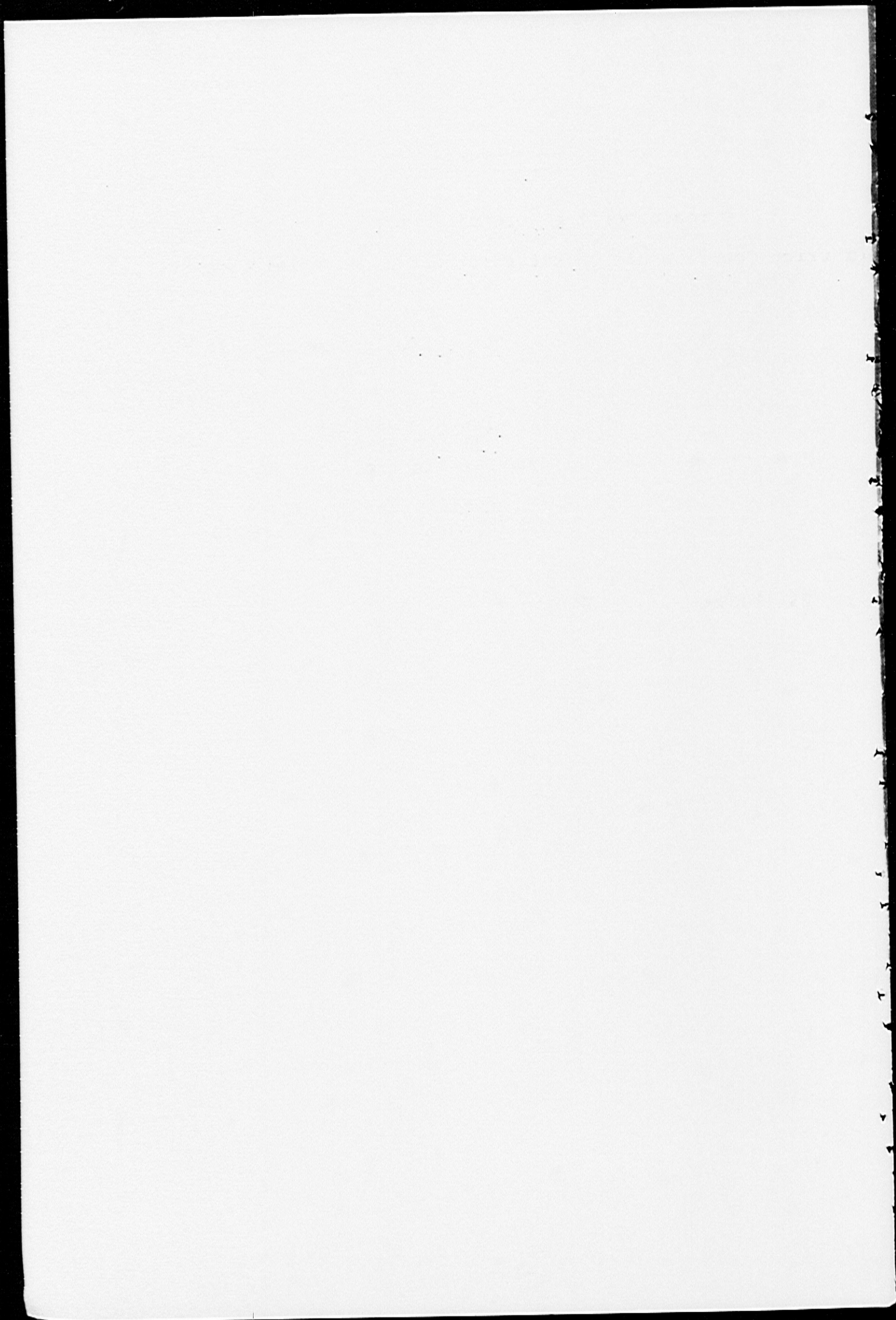
By reason of the foregoing, the judgment of the District Court should be set aside and a new trial ordered.

Respectfully submitted,

Alan J. Berkeley
1156 Fifteenth St., N.W.
Washington, D.C. 20005

Attorney for Appellant
(Appointed by this Court)

June 23, 1969.



IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES OF AMERICA)

v.)

No 22,710

JAMES H. GREEN,)

Appellant.)

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the
Brief for Appellant on the following:

The Honorable Thomas A. Flannery, Jr.
United States Attorney
United States Court House
Washington, D.C. 20001

Alan J. Berkeley

Attorney for Appellant
(Appointed by this Court)

June 23, 1969.

ALB-MGM-10-7
9-21-70
(2)

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES OF AMERICA

v.

No. 22,710

JAMES K. GREEN

Appellant.

Appeal from a Judgment of the
United States District Court for the District of Columbia

REPLY BRIEF FOR APPELLANT

United States Court of Appeals
for the District of Columbia Circuit

FILED MAR 2 1970

Nathan J. Rosenberg
CLERK

Alan J. Berkeley
1156 Fifteenth St., N.W.
Washington, D.C. 20005

Attorney for Appellant
(Appointed by this Court)

March 2, 1970

INDEX

	<u>Page</u>
STATEMENT OF ISSUES PRESENTED	1
ARGUMENT	1
I. Appellant is not precluded from raising on appeal the pre-trial identification of Appellant	1
II. The evidence of Appellant's guilt relied so heavily on identification testimony that error in admitting such testimony cannot be considered harmless	3
CONCLUSION	4

CITATIONS

Cases

Chapman v. California, 386 U.S. 18, 37 S. Ct. 824	4
Proctor v. United States, 404 F.2d 819	2
Amey v. United States, 336 F.2d 743	2
Polonon v. United States, 408 F.2d 1306	3,4
United States v. Indiviglio, 352 f.2d 276	2

Rules

Rule 52(b) Fed. R. Crim. P.

Cases chiefly relied upon

(i)

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES OF AMERICA)

v.)

No. 22,710

JAMES K. GREENL,)

Appellant)

REPLY BRIEF FOR THE APPELLANT

STATEMENT OF ISSUES PRESENTED

The issues presented by the Appellant in this Reply
brief are as follows:

1. Appellant is not precluded from raising on appeal
the pre-trial identification of Appellant.
2. The evidence of Appellant's guilt relied so heavily
on identification testimony that error in admitting such testimony
cannot be considered harmless.

ARGUMENT

- I. Appellant is not precluded from raising
on appeal the pre-trial identification
of Appellant.

The appellee in its brief maintains that the appellant
is precluded from challenging on appeal the pre-trial identifica-
tion of appellant. Appellee cites numerous cases in support of
the proposition that failure to object to the introduction of

improper evidence in the trial court bars the review by the appellate court of such offending evidence.

Rule 52(b) of the Federal Rules of Criminal Procedure provides, however, that this Court may review the improper introduction of evidence notwithstanding failure in the trial court to make timely objection where there exists plain error or a defect affecting substantial rights. The cases cited by appellee do not reject and in some instances support the proposition that this Court has the discretionary authority to notice plain error and defects affecting substantial rights. See e.g., United States v. Indiviglio, 352 F.2d 276 (2d Cir. 1965) (en banc), cert. denied, 383 U.S. 907 (1966).

More recently, in Proctor v. United States, 404 F.2d 819 (D.C. Cir. 1968), this Court remanded a case to the District Court to ascertain the existence of a valid Miranda waiver although no objection to the introduction of the defendant's statement to a police officer was made in the trial court on the grounds that under Rule 52(b), Fed. R. Crim. P. the issue of a Miranda waiver constituted a defect affecting substantial rights. Furthermore, May v. United States, 336 F.2d 743 (D.C. Cir. 1964), cited by appellee for the proposition that the absence of an objection at trial to the introduction as evidence of statements to police officers is not grounds for reversal under Rule 52(b), has been effectively overruled by the holding in Proctor. The holding in Proctor implicitly recognizes that failure to give Miranda warnings constitutes, per se, an error affecting substantial rights.

Similarly, Appellant maintains that failure to afford the appellant the rights enunciated by the Wade-Gilbert-Stovall cases

constitutes an error which, per se, affects Appellant's substantial rights. In the instant case, the conviction rested principally on the identification of the Appellant by the victim as the perpetrator of the alleged offense. Clearly, Appellant's substantial rights are affected by such identification.

In Solomon v. United States, 408 F.2d 1306 (D.C. Cir. 1969), which appellee cites for the proposition that this Court is "reluctant to consider ade claims raised for the first time on appeal," this Court stated that Rule 52(b) "requires us to exercise our discretion whether to notice '[p]lain errors or defects affecting substantial rights' even when no objection is made at trial. Improper identification procedures may violate constitutional rights, and it is difficult for us to conclude that these rights are not 'substantial'." (Emphasis added)

II. The evidence of Appellant's guilt relied so heavily on identification testimony that error in admitting such testimony cannot be considered harmless.

Appellee argues that there was sufficient independent evidence of Appellant's guilt that any possible error in admitting the identification testimony was harmless. However, it is at best mere speculation whether the jury in this instance would have voted for conviction in the absence of Mrs. Pearce's critically important testimony. Without getting involved in the controversy surrounding the application of the principles enunciated in

Apman v. California, 336 U.S. 13, 87 S. Ct. 324 (1967),

Appellant maintains that the admission of Mrs. Pearce's identification cannot be considered harmless. Furthermore, in considering whether this error is "harmless" it should be noted that Appellant, who has had no prior convictions was sentenced for a period of 10 to 30 years. Appellee sets forth as independent evidence of guilt, and therefore making the identification testimony harmless, the testimony of certain FBI Laboratory experts; as indicated in Appellant's Brief, Appellant maintains that such evidence was not conclusive and could not independently support the conviction.

CONCLUSION

By reason of the foregoing and as set forth in Appellant's Brief, the judgment of the District Court should be set aside and new trial ordered.

Respectfully submitted,

Alan J. Berkeley
1156 Fifteenth St., N.W.
Washington, D. C. 20005

Attorney for Appellant
(Appointed by this Court)

March 2, 1970

- 4 -

BEST COPY
from the original

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES OF AMERICA)

v.)

JAMES K. GREEN,)

Appellant.)

No. 22,710

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the
Reply Brief for Appellant on the following:

The Honorable Thomas A. Flannery, Jr.
United States Attorney
United States Court House
Washington, D. C. 20001

Alan J. Berkeley

Attorney for Appellant
(Appointed by this Court)

March 2, 1970